

Bryan W. Shaw, Ph.D., *Chairman*  
Buddy Garcia, *Commissioner*  
Carlos Rubinstein, *Commissioner*  
Mark R. Vickery, P.G., *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

August 22, 2011

### **Via Electronic Filing**

The Honorable Shannon Kilgore  
State Office of Administrative Hearings  
William P. Clements Building  
300 West 15<sup>th</sup> Street, Room 504  
Austin, Texas 78701

Re: BIG D HAZMAT, Duncan Services, Inc. and Robert L. Duncan  
SOAH Docket No. 582-10-5396  
TCEQ Docket No. 2009-1905-IWD-E

Dear Judge Kilgore:

Please find enclosed the Exceptions and Suggested Modifications to the Administrative Law Judge's Proposed Order for the above-referenced case.

Sincerely,

A handwritten signature in black ink that reads "Kari L. Gilbreth".

Kari L. Gilbreth  
Attorney  
Litigation Division

cc: Melissa Chao, Acting Chief Clerk, TCEQ  
Jorge Ibarra, Enforcement Division, TCEQ  
Blas Coy, Public Interest Counsel, TCEQ  
Mr. William W. Thompson, III and Mr. Donald Grissom, Attorneys for  
Respondents, Certified Mail, Article No. 70110470 0000 2421 1659

**SOAH DOCKET NO. 582-10-5396  
TCEQ DOCKET NO. 2009-1905-IWD-E**

**EXECUTIVE DIRECTOR OF THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY,  
PETITIONER**

**VS.**

**BIG D HAZMAT, INC., DUNCAN  
SERVICES, INC. AND ROBERT L.  
DUNCAN,  
RESPONDENTS**

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**BEFORE THE**

**STATE OFFICE OF**

**ADMINISTRATIVE HEARINGS**

**EXECUTIVE DIRECTOR'S EXCEPTIONS AND SUGGESTED MODIFICATIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER**

NOW COMES the Executive Director of the Texas Commission on Environmental Quality ("ED"), by and through his attorney, Kari L. Gilbreth, and makes the following Exceptions and Suggested Modifications to the Administrative Law Judge's ("ALJ's") Proposed Order, pursuant to 30 TEX. ADMIN. CODE § 80.257.

The ED respectfully excepts to the ALJ's Conclusion of Law No. 9, which states: "Respondents' treatment of wastewater without a permit did not, by itself, constitute a separate violation of TEX. WATER CODE ANN. § 26.121."

The ALJ found:

"Respondents placed frac tank rinsate in an oil-water separator and skimmed the oil off. However, the treatment activity alone does not amount to a violation of the cited portion of the statute. The ED failed to establish that the August 25, 2009 discharge from the aeration basin was related to the wastewater that was generated in the equipment washing operation and transferred to the oil-water separator. *Moreover, § 26.121 does not prohibit unauthorized wastewater treatment activities; rather, the plain language of the statute prohibits unauthorized discharges or activities causing pollution.* Therefore, even if the discharge was waste from the equipment washing business, the mere treatment of the wastewater would not constitute a violation of the statute, separate and apart from the discharge or release."<sup>1</sup> [emphasis added]

The ED respectfully disagrees with the ALJ's interpretation of TEX. WATER CODE italicized above.<sup>2</sup>

TEX. WATER CODE § 26.121(c) states: *Except as authorized by the commission, no person may cause, suffer, allow or permit the discharge of any waste or the performance of any activity in violation of this chapter*<sup>3</sup> or of any permit or order of the commission. [emphasis added]

<sup>1</sup> ALJ's Proposal for Decision ("PFD"), pg. 18.

<sup>2</sup> ALJ's PFD, pg. 18.

<sup>3</sup> The applicable chapter being Tex. Water Code ch. 26.

TEX. WATER CODE § 26.027(a) states, in part: The commission may issue permits and amendments to permits for the discharge of waste or pollutants into *or adjacent to water in the state*. [emphasis added]

TEX. WATER CODE § 26.001 includes the following definitions:

(19) "Permit" means an order issued by the commission in accordance with the procedures prescribed in this chapter establishing the treatment which shall be given to wastes being discharged into *or adjacent to any water in the state* to preserve and enhance the quality of the water and specifying the conditions under which the discharge may be made. [emphasis added]

(20) "To discharge" includes to deposit, conduct, drain, emit, throw, run, allow to seep, or *otherwise release* or dispose of, or to allow, permit, or suffer any of these acts or omissions. [emphasis added]

The ED contends that when considered together, the above sections of the Texas Water Code authorize the commission to issue permits and/or regulate activities that cause or will cause pollution into or adjacent to any water in the state.

Paragraph five (5) of the ED's Third Amended Petition ("EDTARP") states in part: "Respondents have discharged waste from the Facility into or adjacent to any water in the state or committed another act that has caused or will cause pollution of any water in the state under the Texas Water Code." The ED believes that he has proven by a preponderance of the evidence that Respondents have both (1) discharged waste from the Facility into or adjacent to any water in the state and (2) committed another act (i.e. processed and treated wastewater generated from the washing and cleaning of oil field equipment and frac tanks without a permit) that has caused or will cause pollution of any water in the state under the Texas Water Code.

The ALJ notes that, "as a result of the April 7, 2009 investigation, Mr. Morgan concluded that unauthorized wastewater treatment was occurring at the Property, and that the facility required an 'evaporation permit'. A notice of violation (NOV) letter was sent to Big D on May 15, 2009, stating that the facility required a permit."<sup>4</sup> Following this statement is a footnote which states: "The term 'evaporation permit' was never discussed or explained in the hearing in this case. The ALJ notes that § 26.132 of the Texas Water Code authorized the Commission to issue permits for evaporation pits, which are pits used for collecting brine water or residual minerals or salts. Such a permit requirement would not be applicable to the facility involved in this case."<sup>5</sup> The ED agrees that the type of evaporation permit referenced in TEX. WATER CODE § 26.132 is not applicable in this case, and was not the type of evaporation permit contemplated by Mr. Morgan.

Although the term "evaporation permit" was not discussed at length during the hearing on the merits, the ED asserts that when the previously discussed sections of the Texas Water Code are considered together, "the performance of any activity" (i.e. processing and treating wastewater generated from the washing and cleaning of oil field equipment and frac tanks without a permit) that discharges "or otherwise releases" (i.e. evaporation of wastewater

<sup>4</sup> ALJ's PFD, pg. 6.

<sup>5</sup> ALJ's PFD, pgs. 6-7.

generated from the washing and cleaning of oil field equipment and frac tanks) waste or pollutants into or adjacent to water in the state (i.e. next to a creek at the Facility) require an evaporation permit. Mr. Morgan's April 7, 2009 investigation report states, in part: "During the investigation it was determined that this facility needs an evaporation permit for its wastewater treatment facility. According to the Texas Waster (sic) Code Chapter 26.121 'Except as authorized by the commission, no person may: discharge sewage, municipal waste, recreational waste, agricultural waste, or industrial waste into or adjacent to any water in the state.' *This includes irrigation, evaporation, or subsurface disposal.*" [emphasis added]

Even if the ALJ remains unconvinced that all four steps in the "closed loop water washout facility" description discussed below were proven by the ED to have occurred by a preponderance of the evidence, it is the ED's position that the first two steps (washing frac tanks and sending the wastewater byproduct to the oil-water separator for skimming oil) is enough of a wastewater treatment activity to require an evaporation permit for such activity.

The Executive Director ("ED") respectfully excepts to the ALJ's Finding of Fact No. 10 in her Proposed Order, which states: "Aside from the washout pit and the oil-water separator, the evidence failed to establish that the wastewater treatment basins (e.g., the clarifiers and the aeration basin) at the Property received waste from the oilfield equipment washing operation."

The ALJ discusses in her PFD the steps outlined in the "closed loop water washout facility" description ("facility description") provided to Ross Morgan [TCEQ investigator] by Mark Jones ("Mr. Jones"), Operations Manager for BIG D HAZMAT, INC. ("BIG D").<sup>6</sup> The ALJ stated the following: "[No] discharge was contemplated. A schematic representing these steps was also given to Mr. Morgan."<sup>7</sup> As discussed in the ED's Closing Brief, the ED finds the last sentence of the facility description of particular note<sup>8</sup>: "At no time is any water allowed to be release [sic] into the wild. Water released from this system would only be done after complete water testing and approval of the TCEQ."<sup>9</sup>

The facility description provided to TCEQ by Mr. Jones in April 2009 specifically stated that no water was allowed to be released in the wild, and if water were "released" (or, discharged) it would not occur until complete water testing and approval of the TCEQ. However, Respondents then did exactly what they said they would not do: they discharged approximately 500,000 gallons of what the ED contends is wastewater into a field toward a creek. Notably, the unauthorized discharge came from step four, the aeration basin, of a four step process where Respondents maintained they were only actually performing steps one and two. Prior to the unauthorized discharge, Respondents neither sought TCEQ approval of this massive discharge nor did they conduct testing of the contents of the aeration basin prior to causing the discharge.

Mr. Duncan claimed that steps (3) and (4) of the "closed loop water washout facility" process did not occur at the Facility.<sup>10</sup> He further testified that it was the intent of BIG D at

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<sup>6</sup> ALJ's PFD, pgs. 4-5.

<sup>7</sup> ALJ's PFD, pg. 5.

<sup>8</sup> ED's Closing Argument, pgs. 5-6.

<sup>9</sup> ED Ex. 16, Bates page 000013.

<sup>10</sup> Mr. Duncan's testimony, pg. 309, lines 15-17 and ED's Closing Argument, pg. 6.

some point in time to utilize steps three and four but this did not occur.<sup>11</sup> The ED finds it curious that Respondents pumped out approximately 500,000 gallons of wastewater from the holding pond/aeration basin (location of step 4 of the process) if they were not utilizing this tank as part of their frac tank washing operation.

Mr. Morgan testified that "the clarifier contains wastewater from the wash rack and the oil/water separator."<sup>12</sup> "It appeared to me that the water in the clarifier was water that came as supernatant or wastewater from the oil/water separator. The oil/water separator would separate oil for them to send to recycle or disposal and then the water in there at some time has to be removed, and it appeared that that's what it was."<sup>13</sup> Mr. Morgan also stated that the water in the clarifier had a slight oily sheen and a petroleum based odor.<sup>14</sup> Mr. Morgan uses the term "clarifier" (as opposed to "Filter ring holding tank") when referring to step 3 of the washout system.<sup>15</sup>

The ALJ stated the following: "Mr. Morgan observed that water in the clarifier had a slight oily sheen and that the material in the tanks had a hydrocarbon or petroleum-like odor are insufficient to establish that the clarifiers and the aeration basin actually received wastewater from the frac tank washing operation. Waste from the former brewery may have been in those basins. The exact sources of the contents of the basins are unknown."<sup>16</sup> As the ALJ points out in her PFD, Mr. Morgan, looking at these laboratory analysis results, noted that petroleum hydrocarbons and benzene were present in sampling from the washout pit.<sup>17</sup> The ED argues that it is more likely than not that the benzene and petroleum hydrocarbons were present in the washout pit as a result of frac tank washing activities conducted by the Respondents, not by wastewater activities conducted by a brewery fifteen years ago.

The ED's burden of proof requires him to establish that a violation occurred by a preponderance of the evidence. The ED believes that the record shows that the ED met his burden of proof. Although Mr. Morgan did not personally witness wastewater actively being transferred between steps 3 ("holding rings," or "clarifier" as identified by Mr. Morgan) and 4 (aeration basin) as indicated in the facility description, he did observe an oily sheen and testified that the wastewater in the aeration basin (step 4) and clarifier (step 3) had a hydrocarbon or petroleum-like odor. Photograph 12 of 14 taken by Mr. Morgan on June 18, 2009 shows a temporary pump with a hose sitting in the clarifier (step 3).<sup>18</sup> It is unclear to the ED why a hose was present in the clarifier if Respondents are maintaining that the clarifier was never used in the wastewater treatment process.

The fact that Mr. Morgan observed an oily sheen and smelled a hydrocarbon or petroleum-like odor in the clarifier and the aeration basin suggests that some type of petroleum based product was present, and it is more likely than not that this product was the result of frac tank washing operations that Respondents admit did occur at the Facility.

Respondents' letter to TCEQ dated December 23, 2009 also included samples from Ana-

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<sup>11</sup> Mr. Duncan's testimony, pg. 309-310, lines 23-25 and lines 1-3, respectively.

<sup>12</sup> Mr. Morgan's testimony, pg. 50, lines 9-10.

<sup>13</sup> Mr. Morgan's testimony, pgs. 50-51, lines 20-25 and line 1, respectively.

<sup>14</sup> Mr. Morgan's testimony, pg. 51, lines 6-10.

<sup>15</sup> Mr. Morgan's testimony, pg. 57, line 12.

<sup>16</sup> ALJ's PFD, pg. 16.

<sup>17</sup> ALJ's PFD, pg. 11 and ED Ex. 21, pg. 2.

<sup>18</sup> ED Ex. 18, pg. 24.

Lab Corp. which were taken on July 23, 2009.<sup>19</sup> Respondents try to blame the owners of the pump used in the unauthorized discharge as being the cause of the "residue ... from that pump ... was from the oilfield company."<sup>20</sup> This would be impossible since the discharge did not occur until August 25, 2009, more than a month after the July 23, 2009 Ana-Lab Corp. samples were taken. Respondents' own samples (from Ana-Lab Corp.) from July 23, 2009 indicate that benzene was present in the "T4 basin" (the holding pond, step 3 of the closed loop water washout facility process).

Respondents knew benzene was present in the "WO Pit" (washout pit) and total petroleum hydrocarbons ("TPH") were present in the aeration basin ("T4") from their own lab's samples<sup>21</sup>, and the ED contends Respondents knew their frac tank washing operation was the cause of the "residue" through their frac tank washing and subsequent treatment of wastewater. With the knowledge of numerous potentially hazardous constituents present in various portions of their wastewater treatment facility, Respondents chose to discharge approximately 500,000 gallons of this wastewater into waters of the state from the aeration basin. Certainly, this is the type of activity regulated by TCEQ through TEX. WATER CODE § 26.121.

Mr. Morgan conducted a follow-up record review (after the August 25, 2009 investigation) of the Facility on December 1, 2009.<sup>22</sup> Mr. Morgan testified that the purpose of the record review was to review the violation which was still "open" in TCEQ's database that was documented in the April 7, 2009 investigation report (failure to obtain a permit for wastewater treatment activities).<sup>23</sup> "We received a response from a representative from BIG D HAZMAT stating that they did not think they needed a permit. However, they would not discharge any water, and if they did, they would seek or [sic] approval. So when the discharge did occur, I then needed to update this violation."<sup>24</sup> A Notice of Enforcement ("NOE") was issued to Mr. Duncan and BIG D on December 4, 2009.<sup>25</sup>

The ED has previously pointed out several discrepancies in Mr. Duncan's testimony both during his deposition and at the hearing on the merits. Respondents have a financial incentive to misstate facts and have done so on a number of occasions. The ED respectfully urges the ALJ to reconsider the credibility of the Respondents' testimony and evidence in this matter, and further urges her to reconsider the record as a whole and the credibility of all of the witnesses at the hearing on the merits when determining whether the ED met his burden regarding the "permit violation".

1. The ED recommends that "Big D Hazmat, Inc." be changed to all capital letters ("BIG D HAZMAT, INC.") for conformity with its corporate filings with the Texas Secretary of State in the first paragraph of the proposed Order ("Order"), Finding of Fact No. 3, and Ordering Provision No. 1 in both places where it is referenced.
2. The ED recommends that the following language be removed from Finding of Fact No.

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<sup>19</sup> ED Ex. 21, pg. 4-24.

<sup>20</sup> ED Ex. 21, pg. 4.

<sup>21</sup> ED Ex. 21, pg. 7.

<sup>22</sup> ED Ex. 19.

<sup>23</sup> Mr. Morgan's testimony, pg. 88, lines 23-24.

<sup>24</sup> Mr. Morgan's testimony, pgs. 88-89, lines 24-25 and lines 1-4, respectively.

<sup>25</sup> Mr. Morgan's testimony, pg. 89, lines 11-13.

- 10 in the Order: "Aside from the washout pit and the oil-water separator, the evidence failed to establish that" and that the word "the" following this language be capitalized as "The" to begin the new sentence.
3. The ED recommends that the word "water" be changed to "wastewater" in Finding of Fact Nos. 9, 14 and 20.
  4. The ED recommends that a new Finding of Fact No. 22 be inserted (and the remaining paragraphs be renumbered accordingly): "On May 28, 2010, an Answer to the Executive Director's Preliminary Report and Petition was filed with the TCEQ Chief Clerk's Office."
  5. The ED recommends that Respondent be changed to "Respondents" in Finding of Fact No. 25.
  6. The ED recommends that the term "Respondent was" be changed to "Respondents were" in Conclusion of Law No. 7 of the Order.
  7. The ED recommends that Conclusion of Law No. 9 in the Order be revised as follows: "Respondents' treatment of wastewater without a permit constituted a separate violation of TEX. WATER CODE ANN. § 26.121."
  8. The ED recommends that the extra space between "alleged" and "unauthorized" be removed in Conclusion of Law No. 12.
  9. The ED recommends that the term "and permit violations" be added after the term "unauthorized discharge" in Conclusion of Law No. 12.
  10. The ED recommends that the total administrative penalty amount of "\$10,000" be changed to "\$42,271.00" in Finding of Fact No. 31, Conclusion of Law No. 12 and in Ordering Provision No. 1 to conform with the penalty amount alleged in the EDTARP.
  11. The ED recommends that the "violation" be changed to "violations" in Ordering Provision No. 1.
  12. The ED recommends that the names "Duncan Services, Inc. and Robert L. Duncan" be added before the term "Docket No. 2009-1905-IWD-E" to include all three Respondents.
  13. The ED recommends that the docket number be changed from "2009-1905-WQ-E" to "2009-1905-IWD-E" in Ordering Provision No. 1.
  14. The ED recommends that the following language be added after the docket number in Ordering Provision No. 1: "within 30 days of the effective date of this Order".
  15. The ED recommends that an "s" be added to the word "discharge" ("discharges") in Ordering Provision No. 3.
  16. The ED recommends that "Respondent" be changed to "Respondents" in Ordering

Provision No. 7, and that the word "has" be change to "have".

17. The ED recommends that an "s" be added to the word "Respondent" in Ordering Provision No. 10.

To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these recommended modifications, the Executive Director excepts to the Proposal for Decision. A copy of the Proposed Order with the recommended modifications is attached hereto as Attachment "A".



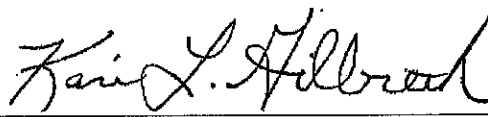
Respectfully Submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.  
Executive Director

Stephanie Bergeron Perdue, Deputy Director  
Office of Legal Services

Kathleen C. Decker, Division Director  
Litigation Division

by 

Kari L. Gilbreth  
State Bar of Texas No. 24040969  
Litigation Division, MC 175  
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(512) 239-1320  
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**CERTIFICATE OF SERVICE**

I hereby certify on this 22<sup>nd</sup> day of August, 2011, the original of the foregoing "Exceptions and Suggested Modifications to the Administrative Law Judge's Proposed Order" ("Exceptions") was filed with the Acting Chief Clerk of the Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day, a true and correct copy of the foregoing Exceptions was sent in the following methods indicated:

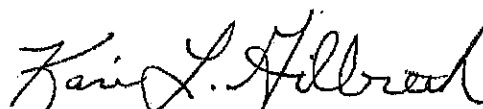
The Honorable Shannon Kilgore  
State Office of Administrative Hearings  
William P. Clements Building  
300 West 15<sup>th</sup> Street, Room 504  
Austin, Texas 78701

Via Electronic Filing

Mr. William Thompson, III and  
Mr. Donald Grissom and  
Attorneys at Law  
Grissom and Thompson, L.L.P.  
509 West 12th Street  
Austin, Texas 78701

Via Facsimile No. (512) 482-8410  
Via First Class Mail

I further certify that on this day a true and correct copy of the foregoing Exceptions was electronically submitted to the Office of the Public Interest Counsel, Texas Commission on Environmental Quality, Austin, Texas.



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Kari L. Gilbreth  
Attorney  
Litigation Division  
Texas Commission on Environmental Quality

## **Attachment A**

# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against  
and Requiring Corrective Action By  
BIG D HAZMAT, INC., DUNCAN SERVICES, INC., AND ROBERT L. DUNCAN,  
TCEQ DOCKET NO. 2009-1905-IWD-E, SOAH DOCKET NO. 582-10-5396**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Third Amended Report and Petition (EDTARP) recommending that the Commission enter an enforcement order assessing administrative penalties against and requiring corrective action by BIG D HAZMAT, INC., Duncan Services, Inc., and Robert L. Duncan (Respondents). Shannon Kilgore, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on April 20, 2011, in Austin, Texas, and prepared the Proposal for Decision.

The following are parties to the proceeding: Respondents, represented by attorneys William Thompson III and Donald Grissom and the Commission's Executive Director (ED), represented by Kari L. Gilbreth, attorney in TCEQ's Litigation Division.

After considering the ALJ's Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

## **I. FINDINGS OF FACT**

1. Robert L. Duncan has owned the property located at 5217 West Loop 281 in Longview, Gregg County, Texas (the Property) since 2007.
2. Prior to its purchase by Mr. Duncan, the Property had been the site of an activated sludge wastewater plant for a brewery, and concrete basins at the site had been used in the brewery's wastewater treatment process.
3. Robert Duncan is the president and owner of BIG D HAZMAT, INC. (Big D) and Duncan Services, Inc. (DSI).
4. Mr. Duncan and his two corporations are the respondents (collectively, Respondents) in this case.
5. Big D carried out an oilfield equipment washing operation at the Property in 2009.
6. DSI paid the workers who washed out the frac tanks.
7. All three Respondents were involved in activities at the site in 2009.
8. In the oilfield equipment washing operation, frac tanks and other pieces of oilfield equipment were rinsed out, with the rinsate entering a concrete washout pit.
9. Material from the washout pit was pumped via an underground pipe to a concrete oil-water separator. The oil that floated to the top was skimmed off and shipped off-site. The wastewater remained in place.
10. The wastewater treatment basins (*e.g.*, the clarifiers and the aeration basin) at the Property received waste from the oilfield equipment washing operation.
11. The oilfield equipment washing operation ceased in about July 2009.
12. On August 25, 2009, Mr. Duncan's son and another person, at Mr. Duncan's request, ran a hose into the aeration basin, attached the hose to a pump, and attached a pipe to the pump.

The pipe ran into a field toward a creek. Thousands of gallons of wastewater were pumped into or close to the creek. The discharge ceased the same day.

13. On August 26, 2009, an environmental investigator for the TCEQ conducted an investigation of the discharge at the Property.
14. On August 26, 2009, the five-day biological oxygen demand for the wastewater in the aeration basin was 220 mg/l – comparable to raw sewage. Further, the concentration of total suspended solids (TSS) was 5,360 mg/l, over 250 times the usual discharge permit limit for a monthly average for TSS.
15. The wastewater in the aeration basin was waste and, specifically, industrial waste.
16. Respondents have never held a permit to discharge waste at or from the Property.
17. On August 25, 2009, Mr. Duncan, Big D, and DSI caused, suffered, allowed, or permitted the discharge of industrial waste into or adjacent to water in the state.
18. TCEQ personnel issued a notice of enforcement (NOE) on October 30, 2009, that alleged Big D had failed to prevent an unauthorized discharge of approximately 500,000 gallons of contaminated water. TCEQ personnel issued another NOE on December 4, 2009, asserting that wastewater treatment was occurring at the Property, that wastewater with constituents of concern had been discharged on August 25, 2009, and that a permit was therefore required.
19. On December 15, 2009, and January 21, 2010, an environmental investigator for TCEQ again visited the Property. No further oilfield equipment washing was observed.
20. By January 2011, the oil-water separator had been removed. The clarifier and aeration basin were still present and had wastewater in them.
21. On May 6, 2010, the ED issued the “Executive Director’s Preliminary Report and Petition.”
22. On May 28, 2010, an Answer to the Executive Director’s Preliminary Report and Petition

was filed with the TCEQ Chief Clerk's Office.

23. The matter was referred to the State Office of Administrative Hearings (SOAH) on July 20, 2010.
24. On July 22, 2010, the Commission's Chief Clerk issued notice of the preliminary hearing to all parties, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held; the violations asserted; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
25. On January 14, 2011, the ED issued the "Executive Director's First Amended Report and Petition."
26. On February 7, 2011, the ED issued the "Executive Director's Second Amended Report and Petition" to the Respondents.
27. Respondents filed an answer on or about February 15, 2011.
28. On March 18, 2011, the ED issued the "Executive Director's Third Amended Report and Petition" (EDTARP). The EDTARP alleged that Respondents violated Texas Water Code § 26.121 by: (1) failing to obtain a permit for wastewater treatment activities; and (2) failing to prevent the unauthorized discharge of wastewater.
29. The ED recommended corrective action and assessment of an administrative penalty of \$42,271. Out of that total, the ED recommended a penalty of \$10,000 for the unauthorized discharge.
30. The hearing on the merits convened on April 20, 2011. Attorney Kari L. Gilbreth represented the ED. Attorneys William Thompson III and Donald Grissom represented Respondents. The record closed on June 10, 2011, with the submission of final written

closing arguments.

31. An administrative penalty of \$47,271 takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in TEX. WATER CODE ANN. § 7.053 and in the Commission's Penalty Policy.
32. It is reasonable and appropriate to require Respondents to: cease unauthorized discharges; develop standard operating procedures to properly dispose of wastewater and conduct employee training to prevent unauthorized wastewater discharges; send pre-treated wastewater to an authorized facility for proper processing and disposal; decontaminate the clarifier and aeration basin, and properly dispose of the wastewater and rinse water.

## **II. CONCLUSIONS OF LAW**

1. Respondents are subject to the Commission's enforcement authority, pursuant to TEX. WATER CODE ANN. § 7.002.
2. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Under TEX. WATER CODE ANN. § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code or of the Texas Health & Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
4. Under TEX. WATER CODE ANN. § 7.052, a penalty may not exceed \$10,000 per violation, per day, for the violations at issue in this case.
5. Additionally, the Commission may order the violator to take corrective action. TEX. WATER CODE ANN. § 7.073.



6. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104, Respondents were notified of the allegations against them and of the opportunity to request a hearing on the alleged violations or the penalties or corrective actions proposed therein.
7. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TEX. ADMIN. CODE § 155.27, and 30 TEX. ADMIN. CODE §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondents were notified of the hearing on the alleged violations and the proposed penalties.
8. The foregoing Findings of Fact support a conclusion that Respondents violated TEX. WATER CODE ANN. § 26.121(c), in that they caused, suffered, allowed, or permitted the discharge of industrial waste into or adjacent to water in the state.
9. Respondents' treatment of wastewater without a permit constituted a separate violation of TEX. WATER CODE ANN. § 26.121.
10. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 7.053 requires the Commission to consider several factors including:
  - Its impact or potential impact on public health and safety, natural resources and their uses, and other persons;
  - The nature, circumstances, extent, duration, and gravity of the prohibited act;
  - The history and extent of previous violations by the violator;
  - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
  - The amount necessary to deter future violations; and
  - Any other matters that justice may require.

11. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties.
12. Based on consideration of the above Findings of Fact, the factors set out in TEX. WATER CODE ANN. § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalty for the alleged unauthorized discharge and permit violations, and a total administrative penalty of \$42,271.00 is justified and should be assessed against Respondents.
13. Based on the above Findings of Fact, Respondents should be required to take the corrective action that the Executive Director recommends.

**NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. BIG D HAZMAT, INC. (Big D), Duncan Services, Inc. (DSI), and Robert L. Duncan (collectively, Respondents) are assessed an administrative penalty in the amount of \$42,271.00 for their violations of TEX. WATER CODE §26.121. The payment of this administrative penalty and Respondents' compliance with all the terms and conditions set forth in this Order completely resolve the matters set forth by this Order in this action. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: BIG D HAZMAT, INC., Duncan Services, Inc. and Robert L. Duncan; Docket No. 2009-1905-IWD-E" within 30 days of the effective date of this Order, to:

Financial Administration Division, Revenues Section  
Attention: Cashier's Office, MC 214  
Texas Commission on Environmental Quality  
P.O. Box 13088  
Austin, Texas 78711-3088.

2. Immediately upon the effective date of this Order, Respondents shall cease any unauthorized discharges.
3. Within 30 days after the effective date of this Order, Respondents shall develop and implement standard operating procedures to properly dispose of wastewater and conduct employee training to prevent unauthorized discharges.
4. Within 45 days after the effective date of this Order, Respondents shall pre-treat the wastewater existing at the facility, in accordance with 40 Code of Federal Regulations Part 403, and shall send the pre-treated wastewater to an authorized facility for proper processing and disposal.
5. Within 60 days after the effective date of this Order, Respondents shall decontaminate the clarifier and aeration basin at the facility, and properly dispose of the wastewater and rinse water generated during decontamination at an authorized facility.
6. Within 75 days after the effective date of this Order, Respondents shall submit written certification of compliance with the preceding four ordering provisions. The certification shall include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that

based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

Respondents shall submit the written certification and copies of documentation necessary to demonstrate compliance to:

Order Compliance Team  
Enforcement Division, MC 149A  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

with a copy to

Noel Luper, Water Section Manager  
Tyler Regional Office  
Texas Commission on Environmental Quality  
2916 Teague Drive  
Tyler, Texas 75701-3734.

7. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas (OAG) for further enforcement proceedings without notice to Respondents if the Executive Director determines that Respondents have not complied with one or more of the terms or conditions in this Commission Order.
8. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
9. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
10. The Commission's Chief Clerk shall forward a copy of this Order to Respondents.

11. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

**ISSUED:**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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**Bryan W. Shaw, Ph.D., Chairman**  
**For the Commission**